

STATE OF MICHIGAN
COURT OF APPEALS

ANDREWS UNIVERSITY,

Plaintiff-Appellee,

v

SUZZETTE BARNABY,

Defendant-Appellant.

UNPUBLISHED

May 15, 2014

No. 310358

Berrien Circuit Court

LC No. 2010-000343-CZ

Before: MURPHY, C.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Following a bench trial, defendant Suzzette Barnaby (Barnaby) appeals as of right from an order entering judgment for plaintiff Andrews University (University). The trial court ordered Barnaby to pay \$43,906.38 for educational debts accrued by her children and further “no caused” Barnaby’s numerous counterclaims against the University. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

The University filed a complaint against Barnaby, alleging that she failed to pay \$37,457.05 in tuition for her children’s education at the University’s affiliated institutions. Barnaby filed an answer and counter-complaint, alleging a myriad of claims, including conspiracy to defraud, negligence, breach of duty of good faith and fair dealing, unconscionability, fraudulent misrepresentation, conflict of interest, malpractice, and breach of contract. Barnaby had been a graduate student at the University and alleged that the University brought the tuition collection action in retaliation for Barnaby pursuing an academic grievance with the University over her grades. Barnaby had failed a class in fall 2008 with Professor Elizabeth Lundy. Barnaby disputed the grade and argued that it was the result of an anonymous derogatory letter that someone sent school administrators regarding Lundy’s class. After Barnaby received the failing grade, she utilized the grievance process to no avail. Barnaby’s claims during the three-day trial included allegations that the University did not follow its own academic grievance procedure and that her performance in the graduate program did not warrant her dismissal from the program.

At the close of the University's proofs, the trial court found that the University's evidence was "unrebutted" and entered judgment against Barnaby in the amount of \$43,906.38 for unpaid tuition for her three sons.¹

At the close of Barnaby's proofs, the trial court entered a directed verdict for the University on many of Barnaby's counterclaims. The trial court subsequently issued an opinion dismissing the remainder of Barnaby's counterclaims, finding that the University had allowed Barnaby full access to the grievance procedure and further finding that the University's decision to drop Barnaby from the graduate studies program was based on her failure to achieve the requisites for her provisional acceptance into the program. Barnaby now appeals as of right.²

II. BARNABY'S COUNTERCLAIMS

Barnaby argues that the trial court erred in entering judgment for the University on all of her counterclaims when it was obvious that the University's witnesses were not worthy of belief. She argues that the University and its individual employees failed to comport themselves in accordance with the proper academic grievance process, thereby denying Barnaby the right to a resolution on her academic grievance. Barnaby further claims that the trial court erred in concluding that she was dismissed from the graduate studies program as the result of her low grade point average (GPA) when, in fact, she was retaliated against as a result of the grievance.

"Following a bench trial, this Court reviews the trial court's conclusions of law de novo, and its findings of fact for clear error." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 195; 761 NW2d 293 (2008). See also MCR 2.613(C) ("Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.") "A finding is clearly erroneous if panel members are left with a definite and firm conviction that a mistake has been made." *Mettler*, 281 Mich App at 195. Issues of credibility are left to the trier of fact. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995).

From the outset, we note that the trial court properly dismissed Barnaby's "claims" against the individual University employees because she made no attempt to serve those individuals with her counterclaim. This was not a situation involving a defect in the manner the individuals were served, which defects may potentially be forgiven under MCR 2.105(J)(3) when a party receives actual notice of suit; rather, there was never any attempt to serve any of the individuals. See *Holliday v Townley*, 189 Mich App 424, 425; 473 NW2d 733 (1991) ("We find . . . that MCR 2.105(J)(3) is not applicable to the present matter where the question is not one of defects in the manner of service, but rather a complete failure of service of process.")

¹ Barnaby does not appear to contest the award on appeal.

² Barnaby raises no fewer than 17 issues on appeal. As in the lower court, Barnaby is acting as her own attorney. Generously stated, her appellate brief is difficult to follow. We have broken down the issues on appeal in what we hope is a cogent treatment of Barnaby's alleged claims of error.

Moreover, the caption of Barnaby's counterclaim does not even list any of the individuals, only the University.

At the time the trial court issued its opinion after trial, Barnaby's remaining claims against the University included conspiracy, fraudulent misrepresentation, wrongful termination, breach of contract, and negligence.

"This Court has defined a civil conspiracy as a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Urbain v Beierling*, 301 Mich App 114, 131-132; 835 NW2d 455 (2013) (internal citations and quotation marks omitted). A conspiracy claim must fail when a plaintiff is unable to establish an actionable underlying tort that is separate and distinct from the conspiracy itself. *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003) aff'd 472 Mich 91 (2005).

The law is well established that in a civil action for damages resulting from wrongful acts alleged to have been committed in pursuance of a conspiracy, the gist or gravamen of the action is not the conspiracy but is the wrongful acts causing the damages. The conspiracy standing alone without the commission of acts causing damage would not be actionable. The cause of action does not result from the conspiracy but from the acts done. [*Roche v Blair*, 305 Mich 608, 613-614; 9 NW2d 861 (1943).]

Barnaby also alleged fraudulent misrepresentation. This Court has noted that:

To prove a claim of fraudulent misrepresentation, or common-law fraud, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. [*Roberts v Saffell*, 280 Mich App 397, 403; 760 NW2d 715 (2008) aff'd 483 Mich 1089 (2009).]

Moreover, "fraud requires a misrepresentation about the past or present." *Lawrence M Clarke, Inc v Richco Const, Inc*, 489 Mich 265, 284; 803 NW2d 151 (2011).

Barnaby further alleged that she was "wrongfully terminated" from the graduate studies program. However, this does not appear to be a stand-alone claim; rather, it appears that Barnaby argues her termination from the program was the result of a breach of contract and negligence.

A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach. This standard means the evidence must persuade the fact-finder that it is more likely than not that the proposition is true. A party may meet its burden with circumstantial evidence, and the fact-finder may weigh both the

quality and the quantity of evidence presented. [*Miller-Davis Co v Ahrens Const, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012) app granted 494 Mich 861 (2013).]

And, finally, “[t]o establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages.” *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

In dismissing Barnaby’s claims, the trial court concluded:

In the instant case the university made Barnaby aware of her precarious academic standing, encouraged her, and allowed her full access to the grievance procedures. That she remained dissatisfied is not, in and of itself, actionable at law. The ultimate decision to drop her from the program was anything but arbitrary and capricious.

Counter-Plaintiff Barnaby has not presented any credible evidence to support any claim of conspiracy and/or [sic] to defraud her. Likewise she has produced no credible evidence to support her claims of fraudulent misrepresentation and/or wrongful termination. Finally, Counter-Plaintiff Barnaby has not proven, by the requisite preponderance of evidence, any breach of contract, by a preponderance of the evidence, [sic] nor has she proven any breach of duty owing, proximate causation of her dismissal from the Master’s program and/or any damages.

There was more than adequate record evidence to support the trial court’s findings of fact and conclusions of law. As the University appropriately points out, Barnaby’s claims on appeal relate to the credibility of the witnesses, an area strictly left to the trier of fact. A rational trier of fact could have found that Barnaby’s dismissal from the graduate program was the result of her abysmal academic performance. A rational trier of fact could have further found that Barnaby was afforded the opportunity to avail herself of the grievance process.

Barnaby was provisionally accepted into the University’s graduate program, meaning that neither her GPA nor her undergraduate transcripts met the standards for full acceptance. This provisional acceptance required Barnaby to achieve a 3.0 GPA for her first 12 credits. At the conclusion of the fall semester in 2008, Barnaby received two “B-”s and one “F.” She had decided to pursue a “deferred grade” in a fourth class. When she was dismissed from the graduate program, Barnaby had accumulated only a 1.78 GPA.

Barnaby complained that the failing grade she received in Lundy’s class was not deserved and pursued an academic grievance. The University’s academic grievance process generally originated “locally,” meaning that a student was expected to first attempt to resolve the issue with her professor. If a resolution was not reached, the student was then expected to approach the chair of the department (Dr. Rudolph Bailey), the dean of the school (Dr. James Jeffery), and finally the associate provost (Dr. Emilio Garcia-Marenko). A student also had the option of utilizing an ombudsperson (James J. North). It is clear that each of these steps was taken. That Barnaby was dissatisfied with the ultimate resolution is not dispositive.

At one point, Barnaby met with Lundy, Bailey, and her academic advisor, Jimmy Kijai. At that time, Lundy provided a copy of her grade report and syllabus, including records of Barnaby's attendance and participation. They went over the categories and assignments. It appeared that Barnaby accepted the explanation given. However, several days later Barnaby approached Kijai and it was clear that she was still dissatisfied. Dean Jeffery had already met with Barnaby on one occasion and declined to meet with her a second time because he believed the matter had been resolved. Jeffery advised Barnaby to pursue the next level of the grievance process, which was the provost's office. Associate provost Garcia-Marenko testified that he investigated the matter and was satisfied that Barnaby's "F" was justified. Ombudsman North testified that he was under the impression that Barnaby was in contact with the University's attorney, Brent Geraty, and he took no further action. North stressed that he was not in a position to change Barnaby's grade and that consultation with an ombudsman was not a requirement of the grievance process.

Although Barnaby presented testimony from her fellow classmates and Professor Nancy Jo Carbonell regarding the difficulty of Lundy's class and her alleged poor treatment of students, the evidence did nothing to support Barnaby's allegation that her grade was the result of retaliation for the so-called anonymous letter. Instead, the testimony simply revealed that Lundy's class was difficult and that it was hard to earn a good grade. Barnaby takes great pains to explain that her GPA was not as low as what was claimed by the University because she received deferred grades, withdrew from some classes, and audited others. However, Garcia-Marenko explained:

Classes like an audit and a W[ithdrawal] do not affect the GPA; that's true. It doesn't mean that do – that they do not affect the hist – the academic history of the student.

While a student is going through the academic journey, and particularly in the case of a student who is admitted with conditions, the condition that in the first 12 credits attempted, they keep a GPA of 3.0.

The fact that they have not been able to complete some courses is affecting their academic history. They have not been able to keep a 3.0 GPA in the first 12 credits they have attempted. And they – the school of education, I have been – I have been informed, made aware by some of my colleagues in the schools, that some – sometimes students prefer to drop a course and get a W so that they would keep their GPA, and that's okay, but when a student is accepted with conditions, that decision of the student is telling something to the school as well.

Thus, in spite of Barnaby's best maneuvering, it was clear that she was not meeting her provisional requirements and was properly dismissed from the graduate program. Barnaby failed to show that the dismissal was in retaliation for her grievance. It is clear from reading her appellate brief that Barnaby's claims are driven by passion, not by the record evidence. There is simply no record evidence supporting Barnaby's claims for conspiracy, fraudulent misrepresentation, wrongful termination, breach of contract, or negligence. As such, the trial court did not err in entering judgment for the University on Barnaby's counterclaims.

III. DISCOVERY AND SCHEDULING ORDERS

Barnaby complains that the trial court erred in failing to force the University to produce: 1) documents revealing the amount Barnaby had paid in tuition; 2) Barnaby's three letters of recommendation; and, 3) all of the assignments turned in for Lundy's class. She further argues that the trial court violated its own case management and scheduling order in order to accommodate the University and thereby prejudicing Barnaby.

"This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion." *In re Pott*, 234 Mich App 369, 372; 593 NW2d 685 (1999). Likewise, this Court reviews "for an abuse of discretion a trial court's decision whether to impose discovery sanctions." *KBD & Assoc, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 677; 816 NW2d 464 (2012) (internal citations and quotation marks omitted). A trial court's decision to enforce its scheduling order is also reviewed for an abuse of discretion. *Kemerko Clawson, LLC v RxIV, Inc*, 269 Mich App 347, 349; 711 NW2d 801 (2005). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *KBD*, 295 Mich App at 677.

On August 8, 2011, a motion hearing was held on various motions. Barnaby had filed a motion to compel discovery, motion for default, and motion for relief from the trial court's scheduling order. The University had filed a motion for partial relief from an earlier order compelling discovery. The trial court reset trial date "to give you both an opportunity to complete your discovery . . ." The court explained, "I think you're both trying. The time frame has been very short. And so I'm going to extend the time as I said." Primarily because the case "started out as one thing and it was been changed to something entirely different." The University was unable to locate the anonymous letter that was sent to the president three years prior. It was not filed under Barnaby's name. Counsel explained, "[w]e're still looking for that." The University also indicated that Barnaby's homework assignments for the semester were unavailable: "The homework assignments are destroyed or done something with after the semester, and they're just not in existence anymore." The trial court thereafter entered a third amended scheduling order.

Several months later, on January 27, 2012, a hearing took place on Barnaby's motion for default judgment due to the University's alleged failure to comply with discovery. At the outset, Barnaby indicated that all of the information she requested was necessary because the University "plans to paint the defendant person and counter-claim as both operating outside of the realm of reality. By withholding key relevant information that was requested through discovery, it is by design on the part of the plaintiff's strategy to define the defendant, her person, and counter-claim as outside of – operating outside of reality. In other words, she's challenged." The trial court, Barnaby, and the University's attorney (Geraty) painstakingly went through each of Barnaby's discovery requests. Geraty indicated that Barnaby's student file had been provided to her. It did not include three letters of recommendation because "we don't have them." As for assignments, Lundy had advised Geraty that "all the papers got placed in kind of a department file for students to pick up. And they're left there for a while, and if the students don't pick them up then they get discarded. And so the university does not have any of those documents." The University discovered a letter dated November 18, 2008, which was ended "sincerely, concerned students" but was not signed. That was the only anonymous letter the University could find. Barnaby had also requested "those complaints . . . that the university education department is

notorious for doing wrong by students over there.” Geraty agreed to investigate complaints from 2005-2009, as to Lundy, Jeffery, and Bailey. As to student evaluations of faculty, Geraty explained that hard copies are discarded after being entered into the computer.

At the January 31, 2012, settlement conference, Barnaby complained about the trial court’s violation of its own scheduling order. “To open discovery in February is not to allow discovery to be completed 42 days before the first day of trial. I am not an attorney. I do need time to prepare, and it, to me, is a great disadvantage to me, your Honor. And I do not believe it is fair to me.”

The trial court did not abuse its discretion when it entered new scheduling orders and declined Barnaby’s motion for default for the University’s alleged failure to comply with discovery. As evidenced by the record, the University did not possess several of the documents requested. Moreover, MCR 2.401(2)(B)(2)(a) specifically provides that a trial court may enter more than one scheduling order. (“More than one such order may be entered in a case.”) The rule further provides that “[t]he scheduling of events under this subrule shall take into consideration the nature and complexity of the case, including the issues involved, the number and location of parties and potential witnesses, including experts, the extent of expected and necessary discovery, and the availability of reasonably certain trial dates.” MCR 2.401(2)(B)(2)(b)

As the trial court aptly noted, this case had metamorphosed. It started out as a simple collection action against Barnaby for unpaid tuition. When Barnaby filed her counterclaim alleging a myriad of tort claims, the original scheduling order became untenable. The trial court clearly indicated its desire to permit both parties the time needed to prepare for trial. Rather than abusing its discretion, the trial court was heroically patient and even-handed.

At the start of the first day of trial, the University sought to substitute witnesses. It had originally named office manager Virginia Nachreiner to authenticate records, but she had retired. The University sought to substitute Graciela Gaytan. Barnaby objected, citing to the scheduling order. The trial court found that there was no prejudice in the substitution. Again, the trial court did not abuse its discretion. The original witness had retired and allowing the person who held the position to authenticate the records was rational. More importantly, Barnaby failed to demonstrate prejudice as a result of the substitution.

Finally, Barnaby complains that the trial court erred in overruling her objection to the University’s most recent tuition statement. In overruling the objection, the trial court noted that it found the current documents helpful. For the most part they were duplicative and simply demonstrated the “carry over charges” owed. Again, the trial court did not abuse its discretion in so doing and Barnaby fails to demonstrate prejudice where she did not contest the University’s evidence regarding tuition.

We hold that the trial court did not abuse its discretion in matters of discovery or the scheduling order.

IV. BARNABY’S MOTION TO DISQUALIFY ATTORNEY GERATY

Barnaby argues that the trial court should have removed Geraty as the University's attorney where Barnaby intended to call him as a witness at trial.

The trial court's factual findings regarding a motion to disqualify counsel are reviewed for clear error. *Buchanon v Flint City Council*, 231 Mich App. 536, 547; 586 NW2d 573 (1998).

Subject to limited exceptions, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . ." MRPC 3.7. "Michigan courts have observed that the purpose of the rule is to prevent any problems that would arise from a lawyer's having to argue the credibility and the effect of his or her own testimony, to prevent prejudice to the opposing party that might arise therefrom, and to prevent prejudice to the client if the lawyer is called as an adverse witness, not to permit the opposing party to seek disqualification as a tactical device to gain an advantage." *People v Tesen*, 276 Mich App 134, 143; 739 NW2d 689 (2007). In order to meet the burden justifying a disqualification, the party seeking the disqualification must show that the attorney is a necessary witness. *Id.* at 144. "[B]oth the Michigan Supreme Court and this Court have found that attorneys are not necessary witnesses if the substance of their testimony can be elicited from other witnesses and the party seeking disqualification did not previously state an intent to call the attorney as a witness." *Id.*

On November 28, 2011, the University filed a stipulated order for substitution of counsel, relieving John Bradshaw as counsel and substituting Geraty in his place. Barnaby objected. A hearing on the matter was conducted on December 19, 2011. Geraty explained the reason for the substitution: "[t]his began as a collections matter, which Mr. Bradshaw initiated and he was hired by a collections agency on our behalf." However, once defendant changed the substance of the case, expenditure of fees became an issue, as well as the nature of the academic process, which Geraty believed he was uniquely qualified to address. The trial court noted that it would not prevent a party from going forward with its own attorney of choice.

Barnaby complained about the substitution because she intended to call Geraty as a witness. The following discussion took place:

THE COURT: Ms. Barnaby, what is it that you claim Mr. Geraty – the knowledge that he has which is relevant to this case?

MS. BARNABY: He came into a grievance process within the university and said he did investigation in the matter. He involved himself. He was not a part of the process, but he evoked [sic] himself in the process and said he did a detailed investigation and responded to me accordingly why he doesn't believe that the school should return my tuition. And he dealt with the dean; he dealt with the president; he dealt with the chair and he dealt with the professor, and – of the education department. So he is a vital part to what it is that I'm trying to prove in court. . . .

THE COURT: And what is the vital part that he is?

MS. BARNABY: He is a part of the grievance process. He made himself a part of the grievance process of the school.

THE COURT: Okay. Well, this is a non-jury trial, so it's not an issue about the jury not having – not – a jury being confused. Well, I'm going to have to give some thought to this. I – frankly, I did not realize that Mr. Geraty was involved in it at this – at this issue, but I – I'm not sure that that would change my decision, but I – I'm going to need to think about it some more.

MR. GERATY: Just so that you understand, I think it's fine for you to take some time to think about what you want to do.

The allegation is that I inserted myself into the grievance process. What happened was, she was going through an academic grievance; in the course of that academic grievance, she said, if you don't refund my tuition, I'm going to sue the university, and so the university came to me and said, you know, we have threats of litigation, would you address this.

I made some inquiries, discovered that we didn't have an obligation to refund the tuition, and so wrote her a letter that said, thank you for the invitation to refund your tuition, but we're not going to do that. That's my involvement in the case. So I was not in the grievance process, except to the extent that she threatened to sue the university.

The court invited briefing on the issue and took the matter under advisement.

The issue was brought up again at the January 27, 2012, hearing:

THE COURT: What I need from you, Ms. Barnaby, is to explain to me why an attorney, which it's standard practice for an attorney to go through everything and draw some conclusions by the attorney I mean, that's what attorneys do . . . but why is Mr. Geraty a necessary witness because he did things that attorneys normally do is from what I can gather what Mr. Geraty said.

MS. BARNABY: From my layman's perspective and what the university policies and procedures explains to me, that an attorney is not part of this [grievance] process. He's not listed there. He's not named there.

THE COURT: But clients determine when they want to involve an attorney. That's the way it is.

The trial court allowed Barnaby an additional week to explain how Geraty was a necessary witness.

At trial, Geraty testified that he was the chair of Andrews Academy Operating Board and general legal counsel. He explained that the grievance process started with the professor, then the chair, then the dean, and then the provost. The president and an ombudsman may also be involved. Geraty denied being part of the grievance process; he only reacted to Garcia-Marenko's referral after the grievance process had ended. After lengthy questioning about Geraty's actions during the grievance process, the trial court interjected:

THE COURT: My understanding is, and given the date of this letter and the prior letter in Exhibit A15, September 30, '09 and December 30, '09, both of those documents were drafted well after the university had dropped you from the program. And they were, in fact, also drafted after there had been letters sent to you that had referenced the possibility of legal action being taking [sic] if you were not satisfied with the outcome.

Now, as general counsel of the university, he was actually brought into this matter due to those – the possibility of legal action being taken against the university, and it's my understanding that he is responding as legal counsel as it relates to those issues and was not taking an active role in regard to the underlying investigation, the underlying grievance procedure, matter pertaining to whether or not you should be dropped from the program or not, so, I really don't believe that this is relevant and/or a proper inquiry of this gentleman.

I assumed when you wanted to call him as a witness that there was some direct evidence that he might have been involved early on or during the grievance process, but I don't see that happening, so if I'm mistaken, I'll apologize and let you continue. But if I'm not, then I'm going to excuse this witness and we're going to move on.

MS. BARNABY: The grievance process, your Honor, ended in February 20, 2010.

THE COURT: Okay. But that was still well after the dropping from the department had occurred, and it was after the formal policy through the direct administration channels – I understand that you had still been involved with the ombudsperson, but these letters and his testimony all have to do with his activities after the threats of litigation had been made and I don't need to hear any more of that.

The trial court did not clearly err in denying Barnaby's motion to disqualify Geraty from acting as the University's attorney where she failed to demonstrate that Geraty's testimony was relevant to her case against the University. As can be gleaned from the record, Geraty had nothing to do with the grievance process and was only consulted after Barnaby sent a letter that included a veiled threat to sue. Once the matter was referred to Geraty, his actions and thoughts were protected by attorney-client privilege. See *Augustine v Allstate Ins Co*, 292 Mich App 408, 420; 807 NW2d 77 (2011).

V. JUDICIAL BIAS

Barnaby argues that the trial court judge was biased and unfair based on his treatment of Donna Jeffery in that the trial court allowed Donna to contact him via personal email. However, Barnaby took no action in the trial court to have the judge disqualified. "Where a defendant knows of alleged bias of the trial judge prior to trial and fails to move for disqualification, the issue is not preserved for appeal." *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985). As such, this Court's review is limited to determining whether a plain error

affecting Barnaby's substantial rights occurred. See *Lenawee Co v Wagley*, 301 Mich App 134, 164–165; 836 NW2d 193 (2013).

On the first day of trial, the University sought to relieve Donna Jeffery from attending trial, noting that she was not employed by the University and had few personal days working for the South Bend School Corporation. Barnaby objected, noting that “Donna Jeffery is at the heart of the conflict.” The trial court took the matter under advisement.

Later that same day, Geraty asked the trial court to relieve Donna from having to appear because he did not believe she was a critical witness and it posed a hardship. The trial court responded that the court rule required someone under a subpoena to state, in writing, the reasons he or she did not have to appear. To that end, the trial court indicated that it would provide Donna with a specific email address to provide a reason for not appearing at trial. She was not to call.

During the second day of trial, the trial court asked Barnaby how she would like to proceed.

There's a couple different way[s] we could go here. You could – you could remain steadfast that you want her here by subpoena and I would have to rule on it per the court rule. Or we could stipulate that you were a student in her class and that you received a respectable B grade and any other stipulation regarding her testimony that the two of you arrive at.

Or, you could introduce all or parts of her deposition testimony as might be agreed to. Or we could have her try to arrange for . . .brief telephone testimony . . .

Barnaby stated: “I could stipulate if she deems her day as very precious, I would like to respect that and give her her day so she can keep it for her personal use and not to come to the court and use her deposition in full as her testimony.”

In so doing, Barnaby voluntarily and intentionally abandoned a known right. See *Roberts v Mecosta Co Hosp*, 466 Mich 57, 64 n 4; 642 NW2d 663 (2002). Moreover, there was nothing about the trial court's conduct that calls into question its impartiality. The party claiming judicial bias must overcome the heavy presumption of judicial impartiality. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Everything was said and done on the record, with Barnaby's express consent. And, while Barnaby complains that Donna sent the judge a private email, it was anything but private.

Affirmed. As the prevailing party, the University may tax costs. MCR 7.219.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly